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VIRGIN PROPERTIES SDN BHD v. SURUHANJAYA SYARIKAT MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[ORIGINATING SUMMONS NO: 24NCC-58-02-2015]
B 16 FEBRUARY 2016

COMPANY LAW: *Resolutions – Member's resolution – Form 11 Companies Act 1965 – Implementation of resolution – Submission to Companies Commission of Malaysia for registration – Refusal of Registrar of Companies to register Form 11* C *– Appeal against decision – Whether appellant furnished necessary information for registration – Appellant's director previously filed suit in High Court bearing same meaning and effect as stated in present Form 11 – Dismissal of suit – Whether present action a second attempt to negate earlier court order – Whether Registrar had to give reasons for his decision – Whether Registrar's decision mala fide –* D *Companies Act 1965, ss. 11(10), 132(2)(c) & 152A*

Dinesh Kanavaji and Ku Azhar were directors in the appellant company. On 26 August 2014, a directors' resolution was passed where it was resolved, *inter alia,* that the directors did not use their position to gain directly or indirectly any benefit for themselves or any other person by filing Form 24. E Pursuant to the said resolution, the appellant's company secretary lodged Form 11 with the Companies Commission of Malaysia ('respondent') on 29 August 2014. *Vide* s. 11(9) of the Companies Act 1965 ('the Act'), the respondent issued a query to the appellant requiring the latter to provide certain information in order to determine whether to grant or refuse the F registration of Form 11. However, upon perusing the appellant's response, the respondent rejected the registration of Form 11 since the explanation proffered could not be accepted by the Registrar. Dissatisfied, the appellant filed this appeal pursuant to s. 11(10) of the Act, seeking for, *inter alia,* the registration of Form 11. According to the respondent, an earlier originating G summons ('the OS') filed by the appellant's directors contained matters that were similar to the appellant's directors' resolution dated 26 August 2014. The OS was subsequently dismissed on 25 August 2014. Further, it was alleged that the respondent had obtained the consent to prosecute both Dinesh Kanavaji and Ku Azhar for an offence under s. 132(2)(c) of the Act for using their position as directors of the appellant to gain directly a benefit H for themselves without the consent or rectification of a general meeting. The appellant, however, argued, *inter alia,* that (i) the respondent did not provide any reasons for the rejection of Form 11; and (ii) the OS was decided on a preliminary objection in relation to jurisdiction which was raised by the respondent.

I

Held (dismissing appeal with costs):

(1) The respondent's decision to refuse the registration of Form 11 was not made hurriedly. Further, the respondent had invoked its power under s. 11(9) of the Act by requesting the appellant to furnish information in respect of the queries. (para 20)

(2) Notwithstanding that the OS was instituted by parties who were different from this action, Form 11 bore the same meaning and effect as prayed by the plaintiffs in the OS and involved the same individuals. This is evident since the shareholders of the appellant were Dinesh Kanavaji and Ku Azhar who were the plaintiffs in the OS. Hence, all the parties in this action and the OS were connected and it could be deemed that this action was but a second attempt to negate the effect of the court's order dated 25 August 2014 in the OS. (para 21)

(3) The respondent's consent to prosecute both Dinesh Kanavaji and Ku Azhar were obtained well before the appellant's application for this OS. Having regard to the fact that the respondent is charged with the administration of, *inter alia,* the Companies Act 1965 and has the task of ensuring that its policy is given effect, this court had to give due regard to the decision of the respondent which included the intended prosecution of both Dinesh Kanavaji and Ku Azhar. To do otherwise would tantamount in assisting the appellant to prevent an intended prosecution under s. 132(2)(c) of the Act. (paras 21 & 23)

(4) There was no authority cited by the appellant that the respondent had to provide detailed reasons for refusing to register Form 11. The word 'may' and 'thinks necessary' in s. 11(9) of the Act indicates that when invoking the provision of the law, the Registrar is in fact exercising his discretion (i) to require the person who submits the document for lodgement to produce such other document or to furnish such information to him as he thinks necessary; and (ii) thereafter decides or forms an opinion whether to refuse to receive or register the document. (para 25)

(5) The Registrar had exercised his discretion properly by invoking s. 11(9) of the Act before he formed his opinion not to register Form 11. There was nothing stated in s. 11(9) that the Registrar must give reasons for his decision. The Registrar, however, had given his reason for refusing to register Form 11 which was primarily because he could not accept the appellant's explanation after a perusal of the information obtained from the appellant. Further, the appellant gave confusing information in relation to the shareholders of the company as seen in the affidavit in support and the corporate information kept by the respondent. In the circumstances, the respondent was justified for refusing to register the appellant's resolution and had arrived at the correct decision when he found the appellant's explanation unacceptable. (paras 25 & 26)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Re Gem Exploration & Minerals NL [1975] 1 ACLR 317 ***(refd)***
Re Kentwood Constructions Ltd [1960] 2 All ER 655 ***(refd)***
Re Liege Investments Pty Ltd [1940] VLR 448 ***(refd)***
White v. Companies Auditors Board [1964] VR 743 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 11(8)(a), (b), (c), (d), (e), (f), (g), (h), (9), (10)(a), (b), 132(2)(c), (3), 152A, 181D, 354, 355
Companies Commission of Malaysia Act 2001, ss. 3(1), 17
Companies Act 1938 [Aus], s. 394(3)
Companies Act 1961 [Aus], ss. 9(15), 12(6)

For the appellant - G Balan; M/s Balan Govind & Assocs
For the respondent - Mohamed Sufyan Mohd Mokhtar & Mohamad Zainal Abidin Ahmad; Companies Commission of Malaysia

Reported by Kumitha Abd Majid

JUDGMENT

Lau Bee Lan J:

[1] *Vide* an originating summons ('OS') dated 9 February 2015 (encl. 1) made pursuant to s. 11(10) of the Companies Act 1965 ('CA 1965'), the appellant, Virgin Properties Sdn Bhd seeks the following reliefs:

(1) Bahawa pihak Perayu yang tidak puas hati dengan keputusan Pendaftar Syarikat, Suruhanjaya Syarikat Malaysia yang diberikan melalui surat mereka bertarikh 23hb Disember, 2014 dan diterima oleh Setiausaha Syarikat pihak Perayu pada 8hb Januari, 2015, merayu terhadap keseluruhan keputusan Pendaftar Syarikat, Suruhanjaya Syarikat Malaysia tersebut dalam menolak pendaftaran Borang 11 Akta Syarikat 1965 pihak Perayu bertarikh 26.08.2014 yang diserahkan di Suruhanjaya Syarikat Malaysia untuk pendaftaran;

(2) Bagi satu perintah bahawa pihak Responden melalui diri sendiri, pekerja-pekerjanya, ejen-ejennya atau dalam apa jua bentuk pun mendaftarkan Borang 11 Akta Syarikat 1965 pihak Perayu bertarikh 26/8/2014 yang diserahkan di Suruhanjaya Syarikat Malaysia untuk pendaftaran menurut Seksyen 154(1), Akta Syarikat 1965;

(3) Bahawa kos guaman ini dibayar oleh Responden; dan

(4) Relif selanjutnya dan/atau relif lain yang mana Mahkamah menyifatkan sesuai dan perlu.

The English translation of the court of the abovesaid reliefs is as follows:

(1) That the Appellant is dissatisfied with the decision of the Registrar of the Companies, Companies Commission of Malaysia granted by a letter dated 23/12/2014 and received by the secretary of the

Appellant on 8/1/2015. The Appellant appealed against the decision of the Registrar of Companies, Companies Commission of Malaysia in refusing registration Form 11 of the Companies Act 1965 dated 26/8/2014 that was submitted for registration of the Companies Commission of Malaysia;

(2) For an order that the Respondent *vide* itself, employees, agents or in any other form to register the Appellant's Form 11 of the Companies Act 1965 dated 26/8/2014 that has been served to the Companies Commission of Malaysia for registration pursuant to s. 154(1) of the Companies Act 1965;

(3) That the legal fees be paid by the Respondent; and

(4) Further relief and/or other relief that is deemed necessary and fit by this Court.

[2] The material facts relevant to the hearing of the OS are these. Pursuant to s. 152A of the CA 1965 the appellant on 26 August 2014 made a members' resolution approved by all the members of the appellant (exh. MR1), *inter alia*, that:

1. IT WAS RESOLVED THAT Dinesh Kanavaji A/L Kanawagi and Ku Azhar Bin Ku Abdul Razak did not use their position either solely or collectively as a director or directors or officers of Virgin Properties Sdn Bhd to gain directly or indirectly a benefit for themselves or any other person or caused detriment to the Virgin Properties Sdn Bhd by filing the form 24 dated 13th August 2008.
2. IT WAS RESOLVED THAT Ku Azhar Bin Ku Abdul Razak in filing the Form 24 dated 13th August 2008 completed this at that material time with the full consent of the general meeting and
3. IT WAS RESOLVED THAT any act of filing the form 24 dated 13th August 2008 by Ku Azhar bin Ku Abdul Razak has been approved, consented to and are hereby ratified.
4. IT WAS RESOLVED THAT Dinesh Kanavaji A/L Kanawagi and Ku Azhar Bin Ku Abdul Razak did not breach Section 132(2) C of the Companies Act 1965 at any material time during their tenure as directors and officers of the company.

[3] The appellant then passed a directors' resolution on 26 August 2014 that the directors be authorised to implement the resolutions dated 26 August 2014 and that the company secretary be authorised to file the necessary forms and documents at the Companies Commission Malaysia ('CCM') (exh. MR2).

[4] Pursuant to the said resolutions, the appellant's company secretary lodged Form 11 dated 26 August 2014 with CCM on 29 August 2014 (exh. MR3) ('Form 11').

[5] In order for the respondent to form an opinion whether to refuse, to receive or register the Form 11, the respondent issued a query to the appellant *vide* letter dated 24 September 2014 (exh. MR4) in accordance with s. 11(9) of the CA 1965 requiring the appellant to provide information in writing regarding the following:

(a) Pengesahan dari syarikat bahawa Borang 11 ini adalah merujuk kepada Mesyuarat Agung syarikat Virgin Properties Sdn Bhd yang diadakan selepas Mahkamah Tinggi Kuala Lumpur memberikan penghakiman dalam Saman Pemula No.24NCC-192-05/2014 iaitu pada 25 Ogos 2014;

(b) Sama ada Borang 11 bertarikh 26 Ogos 2014 yang diserah-simpan ini adalah bertentangan atau berniat untuk melangkaui kesan Perintah Mahkamah Tinggi Kuala Lumpur yang diberikan dalam Saman Pemula No. 24NCC-192-05/2014 yang bertarikh 25 Ogos 2014; dan

(c) Adakah wajar Borang 11 ini didaftarkan dengan mengambil kira kesan penghakiman bertarikh 25 Ogos 2014 yang diberikan oleh Mahkamah Tinggi Kuala Lumpur seperti yang dinyatakan di atas dan juga mengambil kira bahawa pengarah dan syarikat ini dalam proses merayu ke atas keputusan Mahkamah Tinggi tersebut di Mahkamah Rayuan.

[6] The appellant replied *via* letter dated 10 October 2014 (exh. MR5). Upon perusing the appellant's response, the respondent further queried *via* letter dated 20 October 2014 requesting further written information:

(a) Dengan mengambil kira tarikh Borang 24 iaitu 13 Ogos 2008 mengenai terbitan saham baru dan modal saham saham berbayar syarikat, mengapa ratifikasi lembaga pengarah hanya dibuat lebih daripada 6 tahun kemudian iaitu pada 26 Ogos 2014? Sila beri penjelasan mengenai kelewatan selama 6 tahun ini;

(b) Mengapa ratifikasi ini dibuat hanya setelah permohonan pengarah-pengarah syarikat ini melalui Mahkamah Tinggi Kuala Lumpur Saman Pemula No. 24NCC-192-05/2014 ditolak oleh Mahkamah?

(c) Sila beri penjelasan mengenai Borang 11 syarikat bertarikh 26 Ogos 2014 yang tidak menyatakan bahawa ianya dibuat menurut seksyen 181 dan 132(2) Akta Syarikat 1965?

(d) Sila beri penjelasan mengenai kandungan dalam Borang 11 syarikat bertarikh 26 Ogos 2014 yang merujuk kepada perkara yang sama (same subject matter) dengan permohonan pengarah-pengarah syarikat ini melalui Mahkamah Tinggi Kuala Lumpur Saman Pemula No. 24NCC-192-05/2014 yang telah ditolak oleh Mahkamah Tinggi.

[7] Before responding to the respondent further query, *vide* a letter dated 4 November 2014 (exh. MR7) the appellant requested for extension of time to obtain the legal advice.

[8] The appellant thereafter replied to the respondent further query *vide* its company secretary's letter dated 16 December 2014 (exh. MR8), enclosing the appellant's response dated 12 December 2014.

[9] Upon a perusal of Form 11 and the aforesaid explanations from the appellant, the respondent rejected the registration of Form 11 as per its letter dated 23 December 2014 (exh. MR9) which was communicated to the appellant as follows:

> Borang/Dokumen di atas yang diterima pada 23/12/2014 dikembalikan kepada tuan menurut seksyen 11(8)(a), 11(8)(b), 11(8)(c), 11(8)(d), 11(8)(e), 11(8)(f), 11(8)(g), 11(8)(h), 11(9), Akta Syarikat 1965 kerana tidak dapat untuk didaftarkan.
>
> Borang ini ditolak untuk pendaftaran kerana penjelasan yang diberikan tidak dapat diterima oleh Pendaftar Syarikat.

[10] On 20 January 2015 the appellant wrote to the respondent seeking the ground of decision in rejecting the registration of Form 11 and whether the Form 11 could be appropriately amended and resubmitted (exh. MR10).

[11] The respondent *via* e-mail stated that the case was forwarded to the customer service unit and to allow three working days for the reply (exh. MR11).

[12] According to the appellant, since no reply was forthcoming, the appellant filed this appeal pursuant to s. 11(10) of the CA 1965 seeking the relief prayed for in the OS based on these grounds:

> (1) Resolusi Syarikat yang dibuat menurut Seksyen 152 adalah hak ahli-ahli Syarikat dan tidak boleh ditindas oleh pihak Responden;
>
> (2) Akta Syarikat menurut Seksyen 132 juga memberikan hak kepada ahli-ahli untuk membuat Resolusi ini;
>
> (3) Seksyen 154(1) telah mewajibkan pihak Perayu untuk memfailkan Borang 11 dengan pihak Responden;
>
> [18] Tindakan pihak responden yang menolak pendaftaran Borang 11 pihak perayu adalah bertentangan dengan Seksyen 154, Akta Syarikat 1965 yang akan menyebabkan pihak syarikat atau pegawainya dalam kemungkiran Seksyen 154 dan boleh mengenakan pihak perayu denda sebanyak RM1,000.

[13] According to the respondent, the investigations on the contents of Form 11 dated 26 August 2014 and Saman Pemula No. 24NCC-192-05-2014 dated 22 May 2014 revealed that the matters that were approved by the appellant in the directors' resolution were similar to the application of the appellant's directors (at the material time) in Saman Pemula No. 24NCC-192-05-2014.

(a) Saman Pemula No. 24NCC-192-05-2014 that was filed by the appellant's directors (at the material time), *inter alia*, sought for the following reliefs:

(1) Bagi satu perisytiharan bahawa pihak Plaintif-Plaintif, Dinesh Kanavaji a/l Kanawagi (No. K.P: 781121-07-5119) dan Ku Azhar Bin Ku Abdul Razak (No. K.P: 700305-02-5493) sebagai satu-satunya pengarah dan pemegang saham Virgin Properties Sdn Bhd (No. Syarikat: 768453-X) tidak menggunakan kedudukan mereka sebagai pengarah untuk mendapat faedah atau menyebabkan satu kemudaratan kepada Virgin Properties Sdn Bhd (No. Syarikat: 768453-X) dalam menyerahkan Borang 24 Akta Syarikat, 1965 bertarikh 13.8.2008 dan menunjukkan bahawa modal saham berbayar Virgin Properties Sdn Bhd (No. Syarikat: 768453-X) adalah RM7 juta;

(2) Bagi satu perisytiharan bahawa pihak Plaintif-Plaintif, Dinesh Kanavaji a/l Kanawagi (No. K.P: 781121-07-5119) dan Ku Azhar Bin Ku Abdul Razak (No. K.P: 700305-02-5493) sebagai satu-satunya pengarah dan pemegang saham Virgin Properties Sdn Bhd (No. Syarikat: 768453-X) tidak memungkiri sebarang provisi Akta Syarikat 1965 dalam menyerahkan Borang 24 Akta Syarikat, 1965 bertarikh 13.8.2008 dan menunjukkan bahawa modal saham berbayar Virgin Properties Sdn Bhd (No. Syarikat: 768453-X) adalah RM7 juta;

(3) Bagi satu perintah bahawa Defendan Kedua melalui diri sendiri, pekerja-pekerja, ejen-ejennya atau dalam apa jua bentuk pun disekat atau dilarang daripada memulakan sebarang tindakan atau mengganggu bidang kuasa Mahkamah untuk memberikan relif yang sesuai berkenaan dengan penyerahan Borang 24 Akta Syarikat, 1965 bertarikh 13.8.2008 dan menunjukkan bahawa modal saham berbayar Virgin Properties Sdn Bhd (No. Syarikat: 768453-X) adalah RM7 juta sehingga penyelesaian kes ini;

(4) Bahawa kos guaman ini dibayar oleh Defendan Kedua;

(5) Relif selanjutnya dan/atau relif lain yang mana Mahkamah menyifatkan sesuai dan perlu.

(b) Saman Pemula No. 24NCC-192-05/2014 was decided by me on 25 August 2014 wherein I had dismissed the application of the plaintiffs therein with costs of RM8,000 to be paid to the second defendant (SSM) in respect of encls. 1 and 4.

Findings

[14] Section 11(10) of the CA 1965 provides:

(10) *Any person aggrieved by the refusal of the Registrar to register any corporation or to register or receive any document or by any act or decision of the Registrar may appeal within thirty days of the decision of the Registrar to the Court* which may confirm the refusal, act or decision or give such directions in the matter as seem proper or otherwise determine the matter but this subsection shall not apply to any act or decision of the Registrar:

(a) in respect of which any provision in the nature of the appeal or review is expressly provided in this Act; or

(b) which is declared by this Act to be conclusive or final or is embodied in any document declared by this Act to be conclusive evidence of any act, matter or thing.

(emphasis added)

[15] It is not disputed that this is an appeal which is not excluded by the proviso to s. 11(10) of the CA 1965 as the matter under appeal does not impinge on the matters provided in paras (a) and (b) of sub-ss. 10 to 11.

[16] In *Re Gem Exploration & Minerals NL* [1975] 1 ACLR 317 the company, Gem Exploration & Minerals NL appealed against the decisions of the Commission of Corporate Affairs ('the Commission') refusing the company an extension of time for holding its annual general meeting and for refusing to allow the company's profit and loss account to be made up to a date earlier than six months before the annual general meeting. The appeal to the court against the Commission's decision was made under s. 12(6) of the Australian Companies Act 1961 ('CA 1961') which reads:

Any person aggrieved by the refusal of the Commission to register any corporation or to register or receive any document or by any other act or decision of the Commission may appeal to the Court which may confirm the refusal act or decision or give such directions in the matter as seem proper or otherwise determine the matter but this sub-section shall not apply to any act or decision of the Commission:

(a) in respect of which any provision in the nature of an appeal or review is expressly provided in this Act; or

(b) which is declared by this Act to be conclusive or final or is embodied in any document declared by this Act to be conclusive evidence of any act, matter or thing.

[17] It is observed that the appeal under s. 11(10) of the CA 1965 is similar to s. 12(6) of the CA 1961 except for two differences in s. 11(10) of the CA 1965 as follows:

(i) instead of the term 'Commission', the term 'Registrar' is used;

(ii) the appeal to the court against the Registrar's decision may be made within 30 days of the decision of the Registrar but there is no timeframe provided in CA 1961.

[18] Since the appeal provision in s. 11(10) of the CA 1965 is substantially the same as the appeal provision in s. 12(6) of the CA 1961, it would be useful to consider the approach adopted by the court in *Re Gem (supra)* in determining such an appeal. Bowen CJ after reviewing the following cases:

(i) *Re Liege Investments Pty Ltd,* [1940] VLR 448, an appeal from the Registrar of Companies under s. 394(3) of the Companies Act 1938 (Vic), where O'Bryan J expressed the view that the role of the court under the section was to determine whether what the Registrar had done had been done "in accordance with the law" where Bowen CJ stated:

> It does not appear to have been argued that the function of the court was to hear the matter *de novo*, and his Honour in announcing his view (at p. 454) does not state his reasons. In relation to a case such as the present, such a view would seem to render the right of appeal of little value. Furthermore, if the court in the discharge of its function under the section were minded to give directions, it might find itself in some difficulty in doing so, if it were restricted to the material before the Commission.

(ii) *White v. Companies Auditors Board* [1964] VR 743, where Bowen CJ stated "(was) decided on a corresponding but not identical provision of the Companies Act 1961 (Vic.), namely s. 9(15), and His Lordship said Herring CJ held "that the function of the court was to hear the matter *de novo* on appeal from the decision of the Registrar of Companies".

(iii) *Re Kentwood Constructions Ltd* [1960] 2 All ER 655 where "in the related but not corresponding area of appeals to the court from the decisions and acts of liquidators, the view has been taken under the Companies Act that the court proceeds *de novo*".

[19] Thereafter since there is no authority on point, Bowen CJ at p. 4, based on a consideration of the terms of s. 12(6) of the CA 1961, opined:

> (a) It is said it may "confirm the refusal act or decision or give such directions in the matter as seem proper or otherwise determine the matter". These words appear to me to indicate that the task of the court extends beyond simply deciding whether the Commission has acted in accordance with law and beyond an inquiry into whether his discretion has been properly exercised on the material before him in the accepted sense. It extends, I think, to requiring the court to form a view as to what directions should be given or how the matter ought to be determined in its opinion. This would seem to require the court to proceed *de novo* in hearing the matter;
>
> (b) One other matter which should be mentioned is that although I have arrived at the view that the court should proceed *de novo* in those appeals, it is clear that the court will have very much in mind that the Commission for Corporate Affairs is charged with the administration of the Act and has the task of ensuring that its policy is given effect. In proceeding *de novo* the court will always pay due regard to the decision of the Commission;

(c) It is proper "for the Commission to consider facts in relation to the company's past history (such as the fact that it had gained an extension in the previous year) as part of the circumstances to be weighed in arriving at a determination of an application such as the present."

[20] Applying the approach adopted in *Re Gem* to the factual matrix of this present case, I find:

(i) The decision of the respondent to refuse the registration of Form 11 (appellant's resolution) dated 28 August 2014 was not made hurriedly.

(ii) The respondent had invoked its power under s. 11(9) of the CA 1965 requesting the appellant to furnish information in respect of the queries:

In response to the respondent's letter dated 24 September 2014 (exh. MR4) alluded to in para. 5 above, the appellant replied *vide* letter dated 9 October 2014 (exh. MR5), *inter alia*, as follows:

Para 2(a) - [No response]

Para 2(b) -

Form 11 dated 26.8.2014 has no connection or bearing with the decision of Yang Arif Dato Lau Bee Lan in OS No. 24NCC-192-05/2014 as the OS is for an order of declaration and made pursuant to Sections. 354 & 355 of the Companies Act, 1965.

The Form 11 dated 26.8.2014 was filed in accordance to law pursuant to Section 132(2) of the Companies Act, 1965 which provides for ratification by the general meeting and this general meeting was held on 26.8.2014 to ratify the act done by the then directors.

Therefore the Form 11 dated 26.8.2014 was not in contravention of any orders of the Court or any order made by the Kuala Lumpur High Court in OS No. 24NCC-192-05-2014 as the KL High Court made no orders on 25.9.2014.

Para 2(c):

The KL High Court in OS No. 24NCC-192-05-2014 made no orders and therefore there can be no effect to any parties. The appeal lodged by the former directors to the Court of Appeal is purely to challenge the KL High Court decision given on 25.8.2014 in holding that Section 354 of the Companies Act, 1965 cannot be used by members in regards to Section that may have penal consequences.

Therefore Form 11 that was registered with CCM was clearly done pursuant to Sections 132(2) and 181 D of the Companies Act, 1965.

In response to the respondent's letter dated 20 October 2014 (exh. MR6) alluded to in para. 6 above, the appellant replied *vide* letter dated 12 December 2014 (exh. MR8), *inter alia,* as follows:

Para 2(a):

Form 24 was dated 13 August 2014 and since the filing of Form 24, the appellant and its directors were not aware of any irregularity in relation to Form 24. In May 2013, the directors were informed by various notices from SSM to attend at its office for the directors to provide a statement. The appellant informed SSM *vide* letter dated 15 May 2013 that:

> Subject to your good office informing us of any irregularities, omission or defects pertaining to any breach of the Companies Act, which has occurred during the tenure of our former directors which we hereby undertake to obtain an order from High Court of Malaya declaring such irregularity valid notwithstanding any such defect or deficiency pursuant to Section 355 of the Companies Act.

No response from the respondent.

In May 2014, the former directors of appellant were verbally informed by SSM that they were investigating a breach of s. 132(2)(c) by the former directors which implied that the directors had acted against the interest of the company or its board.

The appellant then filed OS No. 24NCC-192-05-2014 for an order of declaration pursuant to ss. 354 and 355 of the CA 1965.

The appellant "as a matter of courtesy included SSM as the second defendant although they have no jurisdiction to object to the (appellant's) application."

The second defendant took a jurisdictional objection in regards to the applicability of ss. 354 and 355 of the CA 1965.

The High Court upheld the jurisdictional objection and the matter was not heard on the merits. The former directors have appealed to the Court of Appeal against the decision of the High Court.

Only in May 2014, the former directors were informed by SSM of a potential breach of s. 132(2) and the Board of Directors decided to do a special resolution and file the same in Form 11.

There was no delay of six years; the resolution was done on 26 August 2014 as the directors were informed of the issues in May 2014; the resolution was done within four months from the date of issue being informed to the directors. The appellant received

professional advice that any rectification under ss. 132(2) and 181D of the CA 1965 does not impose any time limit for the said resolution to be done.

Para 2(b):

> The law provided for the said resolution to be done pursuant to ss. 132(2) and 181D of the CA 1965 without any limitation.
>
> The rectification and orders sought in OS No. 24NCC-192-05-2014 are independent of each other and the appellant was advised to act on their statutory rights under ss. 132(2) and 181D of the CA 1965 which the appellant did by filing Form 11 dated 28 August 2014.

Para 2(c):

There is no provision in the law for ss. 132(2) and 181D to be officially stated in the resolution. "However the fact that the above two sections provide for the said resolution to be done, it is a right exercised by the company, VPSB pursuant to the law."

Para 2(d)

> Form 11 filed by the Company and the OS filed by the directors are not the same subject matter and therefore the Form 11 cannot be said to be sub-judice the High Court matter. The OS filed by the former directors is for declaratory orders and the Form 11 filed by the Company reflects a Resolution for ratification. The subject matter of declaration and ratification is not the same. Declaratory relief is defined as:
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> > Declaratory relief refers to a judgment of a court which determines the rights of parties without ordering anything be done or awarding damages. By seeking a declaratory judgment, the party making the request is seeking for an official declaration of the status of a matter in controversy. Optimally, the resolution of the rights of the parties involved will prevent further litigation. For example, a party to a contract may seek the legal interpretation of a contract to determine the parties' rights, or an insured may seek a determination of insurance coverage under a policy.
>
> The definition of ratification is "to approve or sanction formally.
>
> The Form 11 reflects the Resolution dated 26.8.2014 and is done in accordance to law and Sections 132(2) and 181D specifically provide the jurisdiction to the Company to make the Resolution and there is no limitation imposed at all.

A

> Moreover the High Court did not decide on the OS or made any orders which will make this matter sub-judice.
>
> The High Court hearing was only confined to the issues of jurisdiction limited to the usage of Section 345 of the Companies Act, 1965.

B

(iii) The respondent had carefully considered Form 11 and the aforesaid responses of the appellant before the respondent refused the registration of Form 11 (appellant's resolution) dated 28 August 2014 because the explanation proffered could not be accepted and the decision was not made *mala fides*.

C

[21] I agree with the respondent's submission that notwithstanding that OS No. 24NCC-192-05-2014 was instituted by parties who are different from this action; but Form 11 (appellant's resolution) dated 28 August 2014 bears the same meaning and effect as prayed for by the plaintiffs in OS No. 24NCC-192-05/2014 and involves the same individuals. This is

D

evident as the shareholders of the appellant are Dinesh Kanavaji a/l Kanawagi and Ku Azhar bin Ku Abdul Razak who are the plaintiffs in OS No. 24NCC-192-05-2014.

(a) Hence all the parties in this action and OS No. 24NCC-192-05-2014 are connected and it can be deemed that this action is but a second

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attempt to negate the effect of the court's order dated 25 August 2014 in OS No. 24NCC-192-05-2014. Further, I agree with the respondent's submission that:

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> Tindakan Perayu ini jelas adalah satu cubaan untuk menggunakan apa cara yang boleh agar kesalahan dan/atau perlanggaran akta-akta berkaitan yang dilakukan oleh Pengarah-pengarah Perayu (pada ketika itu), Dinesh Kanavaji a/l Kanawagi dan Ku Azhar bin Ku Abdul Razak dapat direktifikasi dan tindakan penguatkuasaan tidak diambil ke atas Pengarah-pengarah Perayu (pada ketika itu).

G

This is particularly evident when the respondent had obtained the consent to prosecute both Dinesh Kanavaji a/l Kanawagi and Ku Azhar bin Ku Abdul Razak for an offence under s. 132(2)(c) of the CA 1965 punishable under s. 132(3) of the same for using their position as director of the appellant company to gain directly a benefit for himself

H

without the consent or ratification of a general meeting. Both these consent to prosecute from the Public Prosecutor are dated 5 July 2013; hence were obtained well before the appellant's application for this OS dated 9 February 2015 for an order that the respondent register Form 11 dated 28 August 2014 lodged by the appellant with the

I

respondent.

(b) Both the consent to prosecute are collectively marked as exh. RNW3 and are similar in nature except for the amount of shares involved. For ease of reference I shall reproduce the consent to prosecute in respect of Dinesh Kanavaji a/l Kanawagi which reads as follows:

> IZIN DI BAWAH SEKSYEN 36
>
> Pada menjalankan kuasa yang diberi di bawah Seksyen 36 Akta Suruhanjaya Syarikat Malaysia 2001 dan terletakhak pada saya mengikut Seksyen 376(3) Kanun Tatacara Jenayah (Akta 593) saya Nur Izzaini Binti Ishak, Timbalan Pendakwa Raya, dengan ini memberi izin bagi menjalankan pendakwaan terhadap:
>
> Dinesh Kanavaji a/l Kanawagi (No. K/P: 781121-07-5119)
>
> kerana pada 13 Ogos 2008, selaku pengarah syarikat Virgin Properties Sdn Bhd (No. Syarikat: 768453-X) yang mempunyai alamat pejabat berdaftar di AGD Secretarial Services, 40-2, 2nd Floor, Jalan Telawi, Bangsar Baru, 59100 Kuala Lumpur, tanpa kebenaran di mesyuarat agung syarikat tersebut telah menggunakan jawatan kamu sebagai pengarah syarikat untuk membuat umpukan sejumlah 3,430,000 unit saham syarikat Virgin Properties Sdn Bhd bagi manfaat diri kamu sendiri. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah Seksyen 132(2)(c) Akta Syarikat 1965 (Akta 125) dan boleh dihukum di bawah Seksyen 132(3) Akta yang sama.
>
> Bertarikh: 5/7/2013
>
> t.t.
>
> NUR IZZAINI BINTI ISHAK
> TIMBALAN PENDAKWA RAYA

[22] The respondent ('SSM') is a corporate regulator established under s. 3(1) of the Companies Commission of Malaysia Act 2001 (Act 614) ('CCMA') entrusted with the statutory functions, *inter alia*, to ensure that the provisions of the CCMA and the laws specified in the First Schedule (which include CA 1965) are administered, enforced, given effect to, carried out and complied with, to regulate matters relating to corporations and companies and to encourage proper conduct amongst directors, secretaries and other officers of a corporation in order to ensure that all corporate and business activities are conducted in accordance with established norms of good corporate governance and to encourage and to promote corporate responsibility and business sustainability (s. 17 of the CCMA).

[23] Thus having regard to the fact that the respondent is charged with the administration of amongst others the CA 1965, and has the task of ensuring that its policy is given effect, in deciding this appeal I would have to give due regard to the decision of the respondent which includes the intended prosecution of both Dinesh Kanavaji a/l Kanawagi and Ku Azhar bin Ku

Abdul Razak. To do otherwise would be tantamount to assisting the appellant to prevent an intended prosecution under s. 132(2)(c) CA of the 1965.

[24] I find the respondent has in the affidavits traced the past history leading to this OS, in particular OS No. 24NCC-192-05-2014, the court's decision in the latter case (exh. MRM3) and has reached the correct conclusion in exercising his discretion in refusing the registration of Form 11 (appellant's resolution).

[25] The appellant contends the respondent did not give reasons for the rejection of Form 11. I find this contention is not altogether accurate. The respondent has in exh. MR9 stated that he rejected the registration of the appellant's Form 11 primarily because the explanation proffered (penjelasan yang diberikan) by the appellant cannot be accepted by the Registrar.

(a) The appellant further contends that "hanya keputusan bahawa Borang 11 ditolak diberikan kepada pihak plaintif tanpa apa-apa jelasan atau butir sebab penolakan pendaftaran Borang 11 diberikan". I find there is no authority cited by the appellant to support the appellant's contention that in refusing the registration of Form 11, the respondent has to provide detailed reasons.

(b) Be that as it may, s. 11(8) of the CA 1965 provides the specified circumstances when the Registrar may request:

> (f) that the document be appropriately amended or completed and re-submitted;
>
> (g) that a fresh document be submitted in its place; or
>
> (h) where the document has not been duly completed, that a supplementary document in the prescribed form be lodged.

The Registrar may request the matters in (f), (g) or (h) when the Registrar is of the opinion that a document lodged or registered with him provided in s. 11(8):

> (a) contains matter contrary to law;
>
> (b) contains matter that, in a material particular, is false or misleading in the form or context in which it is included;
>
> (c) by reason of an omission or misdescription has not been duly completed;
>
> (d) does not comply with the requirements of this Act; or
>
> (e) contains an error, alteration or erasure.

Under s. 11(8) of the CA 1965, it is my respectful view under the specified categories under (a), (b), (c), (d) or (e), the Registrar has the option of exercising his discretion under the three circumscribed circumstances under (f), (g) or (h).

(c) Further, s. 11(9) of the CA 1965 provides:

> (9) The Registrar **may require** a person who submits a document for lodgement with the Registrar to produce to the Registrar such other document, or to furnish to the Registrar such information, **as the Registrar thinks necessary in order to form an opinion whether he may refuse to receive or register the document**.
>
> (emphasis added)

It is pertinent to note the usage of the words "may" and "thinks necessary" in s. 11(9). These words indicate that when invoking this provision of the law, the Registrar is in fact exercising his discretion:

(i) to require the person who submits the document for lodgement to produce such other document or to furnish such information to him as he thinks necessary; and

(ii) thereafter decides or forms an opinion whether to refuse to receive or register the document.

(d) In this present case, for the reasons which I have alluded before, I find the Registrar has clearly exercised his discretion properly in invoking s. 11(9) of the CA 1965 before he formed his opinion to refuse to register Form 11.

(e) I find there is nothing in s. 11(9) of the CA 1965 which states that the Registrar must give reasons for his decision. Be it as it may it would be prudent for the Registrar to give his reasons and in this present case I find the Registrar has given his reason for refusing to register Form 11 which primarily is because he could not accept the explanation of the appellant after a perusal of the information obtained from the appellant. Thus I am satisfied that he has arrived at the correct decision when he found the explanation of the appellant was not acceptable.

[26] Further, I find the appellant has given confusing information. In para. 1 of the affidavit in support of the appellant affirmed by Melissa Kaur Manakh a/p Ram Singh on 9 February 2015 (encl. 2), she averred she is the director of the appellant. Then in the appellant's resolution, exh. MR1, of the affidavit in support of the appellant, it is stated the names of the member (shareholders) of the appellant are Melissa Kaur Manakh a/p Ram Singh and Zailan bin Kassim. However this information differs from the corporate information kept by the respondent as at 10 April 2015 where the members (shareholders) of the appellant are Dinesh Kanavaji a/l Kanawagi and Ku Azhar bin Ku Abdul Razak (exh. RNW4, respondent's second affidavit affirmed by Roslizaawati Nur Wahida bt Abd Ahmad on 13 April 2015 (encl. 6). There has been no rebuttal to the corporate information in exh. RNW4. This is extremely relevant because every member's resolution has to be signed by the members of the company. However in this present

OS, the appellant's resolution, exh. MR1, affidavit in support of the appellant has been signed by two individuals who are not members (shareholders) of the appellant company. Hence I hold the respondent is justified for refusing to register the appellant's resolution.

[27] I find the contention of the appellant that this court decided OS No. 24NCC-192-05-2014 on a preliminary objection raised by the respondent on jurisdiction is with respect misconceived. I had decided the case on its merits wherein I had dismissed the plaintiffs' application for OS No. 24NCC-192-05-2014 and the plaintiffs' *inter partes* application for the interlocutory injunction. This can be seen from grounds of decision of the court dated 26 April 2015 in exh. MRM3, affidavit in support of the recusal application filed by the appellant.

[28] The appellant's submission that "the appellant's resolution dated 26 August 2014 is not caught by *res judicata* as claimed by the respondent" is with respect, misplaced. The respondent has never raised the issue of *res judicata* in its two affidavits in opposing the appellant's appeal. Therefore the case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 at 198 relied on by the appellant is irrelevant.

Conclusion

[29] For the reasons adumbrated above, I had dismissed the appellant's appeal in encl. 1 with costs of RM3,000 to be paid by the appellant to the respondent within one month from the date of this order.